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Supreme Court of the United States

OCTOBER TERM, 1936

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OCEAN BEACH HEIGHTS, INC., A CORPORATION; NORMANDY BEACH DEVELOPMENT COMPANY, A CORPORATION; LUCILLE F. ENSIGN AND HER HUSBAND, WALTER C. ENSIGN, AND TATUM'S OCEAN PARK COMPANY, A CORPORATION,

Petitioners,

vs.

THE BROWN-CRUMMER INVESTMENT COMPANY, A KANSAS CORPORATION, AND TOWN OF NORTH MIAMI, A MUNICIPAL CORPORATION; DANA W. ROBBINS, AS MAYOR OF SAID TOWN, J. H. GRIBBLE AS TAX COLLECTOR AND TAX ASSESSOR OF THE SAID TOWN, MRS. E. MAY AVIL AS CLERK AND TREASURER OF THE SAID TOWN, AND E. C. HARNER, MRS. CECILLE SEVIER, MRS. ELLA F. KLEFEKER, D. D. AVIL AND H. W. JONES AS MEMBERS OF THE TOWN COUNCIL OF SAID TOWN,

Respondents.

BRIEF OF RESPONDENT

GILES J. PATTERSON,
Jacksonville, Florida,
Solicitor for Respondents.

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REASONS GIVEN BY PETITIONER

The reasons given by the Petitioner why a writ of certiorari should be issued by this Court are that:

1. The Circuit Court of Appeals, in the majority opinion, by refusing to follow the Florida case of *Leatherman et al. v. Alta Cliff Company*, has decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals, in the majority opinion, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

The Respondent objects to the issuance of the writ of certiorari and asserts that the decision of the Circuit Court of Appeals is in strict conformity with decisions of the Florida Court and with the decisions of the Federal Courts. The real complaint here is that the Circuit Court of Appeals did not regard the *Alta Cliff* case as decisive. It did not do so because the Florida Court in a later decision did not so regard it.

AS TO THE FIRST REASON.

THE CIRCUIT COURT OF APPEALS, IN THE MAJORITY OPINION, BY REFUSING TO FOLLOW THE FLORIDA CASE OF LEATHERMAN ET AL. V. ALTA CLIFF COMPANY, HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

Respondent asserts that the opinion of the majority of the Circuit Court of Appeals is not only not in conflict with but conforms fully to "*applicable* local decisions."

(a) To support this assertion we submit that the opinion of the majority of the Circuit Court of Appeals approves the

decision of the Supreme Court of Florida in *Mahood* v. *State ex rel Davis*, 101 Fla. 1254, 133 So. 90, when it said:

> "The Supreme Court of Florida correctly held, of course, that the statute under which the Town was incorporated was one for self incorporation and not for the conquest of territory. * * * We think it clear then that if, as a matter of fact, as was found in the ouster case, while the property east of the Bay was embraced within the corporate limits, it was not prior to the incorporation a part of the settlement or community incorporated, it could not by the acts done have been made a part of it de jure."

(b) We submit that it conformed to the holding of the Florida Supreme Court in the same case further when it said:

> "The Supreme Court of Florida has not held in the cases cited that if, as a matter of fact, the territory on both sides of the Bay was a part of the hamlet before it was incorporated, it could not be incorporated as a town. Indeed, in the Mahood case, it decided the contrary of this."

(c) The decision of the Circuit Court of Appeals conformed to the "*applicable decisions*" of the Supreme Court of Florida when it held:

> "We agree with appellees that *the judgment in the ouster suit spoke only as to the future*, determined only that from and after the ouster the Town did not exist de jure in the excluded territory. We agree with them, too, that, while the judgment in that proceeding prevented the Town from imposing any new obligations on and from exercising any further general jurisdiction over it, as a judgment it was without effect upon obligations already fixed and existing against that territory."

because the Florida Court in the case of *State ex rel Fidelity Life Association* v. *Cedar Key*, 122 Fla. 454, 165 So. 672, de-

cided on the 6th day of February, 1936, a suit by a bondholder to enforce a tax levy, held:

> *"Such quo warranto judgment,* as we have seen, *must be construed as having a prospective operation only, in so far as past incurred and duly validated municipal bonds of the ousted or dissolved municipal corporation is concerned;* * * * The judgment in the quo warranto proceeding is to be presumed, as a matter of law, not to call in question matters expressly or impliedly settled or adjudicated in the bond validation proceeding."

(d) The decision of the Circuit Court of Appeals conformed to the holding of the Florida Supreme Court when it held:

> "We think it plain that, under the facts as they appear in the record, of a good faith attempt at incorporation, of user of, and acquiescence in the exercise of corporate power, *a de facto corporation was created as to the territory east of the Bay, and that it is bound for the payment of the bonds in question.*"

because the Supreme Court of Florida in the case of *State ex rel Fidelity Life Association* v. *Cedar Key, supra,* held that even though the act incorporating the City of Cedar Key was void it

> *"was at least a de facto municipal corporation whose status as a putative de jure corporation had not been duly challenged by the State of Florida at the time the city's bonds and coupons were floated and sold"*

and granted a writ of mandamus to compel the levy of a tax to pay them.

Petitioner (page 9) attempts to avoid the effect of the decision of the Florida Court in the *Cedar Key* case, *supra,* by claiming that the Supreme Court of Florida, in the last paragraph of that opinion, "saved the rights of individual property owners who might be able to show that their lands were never *lawfully included in the city*". They say "what we have

here is just exactly what the Supreme Court of Florida referred to in the concluding paragraph of its opinion, namely, individual property owners setting up that their lands never were lawfully in the Town of North Miami, and they are supporting their contention with the *Alta Cliff* case, precisely in point." But the last paragraph of the opinion of the Florida Court in the *Cedar Key* case did not hold what Petitioner claims; on the contrary, it said in that paragraph:

> "It follows that the respondent officials of the city of Cedar Key should be ordered to exercise the corporate functions commanded of them by the alternative writ, the ouster judgment, relied on as a defense, to the contrary notwithstanding, and that if any question of territorial boundary for the application of the taxing power commanded to be exercised on the part of the de facto municipal corporation of the city of Cedar Key should arise, that it should be duly adjudicated at the instance of such individual complainants *as may be able to prove that they were at no time ever within the orbit of the respondent municipality's exercise of corporate jurisdiction as an actually functioning de facto municipality claiming to be the city of Cedar Key prior to the judgment of ouster.*"

We submit that the opinion of the Court of Appeals fully conforms to the quoted holding because it held:

> "It is without dispute in the evidence that, from the time of its formation until the ouster proceeding, *the Town exerted jurisdiction over the whole territory.* * * * It levied and collected taxes from it. It was understood by all concerned that it extended over it. *It did, in fact, though not in law, so extend.*"

The District Judge found as a matter of fact that the lands east of the Bay were within the orbit of the respondent municipality's exercise of corporate jurisdiction as an actually functioning de facto municipality claiming to be the city prior to the judgment of ouster. Such finding of fact is conclusive.

The Florida Court would, therefore, have applied the same rule in this case that it applied in the *Cedar Key* case.

As this suit is brought by bondholders against the municipality the "applicable" decisions of the Florida Court, which are to be looked to, are only those rendered in suits brought by bondholders against municipalities upon bonds issued prior to the institution of ouster proceedings, and not decisions rendered by the Florida Court in ouster proceedings brought by the State, or suits brought by taxpayers against the City and to which bondholders were not parties. The Supreme Court of Florida has itself applied an entirely different rule in the two classes of cases. A Federal Court will not follow a decision made by the Supreme Court of Florida in a quo warranto suit or one made in a suit brought by a taxpayer based solely upon a decree of ouster in a quo warranto proceeding, in a suit brought by a person holding bonds issued by a municipality in good faith before any proceeding in quo warranto was begun, when the Florida Supreme Court itself would not do so.

Another illustration of the view of the Florida Court is found in the dissenting opinion of Judge Buford in *State* v. *City of Coral Gables*, 114 Fla. 326, 154 So. 234. He said:

> "The question as to whether or not the city may continue to levy and collect taxes on this particular property in so far as the same may be required to be levied against that property to produce a fund to pay principal and interest on bonded indebtedness created without objection on the part of the landowner while the lands were included within the city of Coral Gables could not here be adjudicated because the rights of bondholders or the holders of other municipal obligations so created are not at issue in this case."

In fact, the Circuit Judge of Dade County who issued the writ of quo warranto against the Town of Miami Shores in an opinion (p. 334 Tr.) said:

> "It may be that the de facto municipal corporation of Miami Shores is indebted by bond issues or otherwise, but there are ample provisions by law and in equity to take care of such matters, and ultimately, if necessary, legislation may be sought to enforce the debts of said town which are by no means discharged by this ruling."

Incidentally, this Court should consider the fact that the Circuit Court of Appeals in *City of Winter Haven et al.* v. *J. W. Gillespie et al.*, 84 Fed. (2d) 285, decided this same question of Florida law in the same manner.

The effort of Petitioner to show a conflict of decisions between State and Federal Courts is misleading as shown by the quotations from the opinions.

AS TO THE SECOND REASON.

> THE CIRCUIT COURT OF APPEALS, IN THE MAJORITY OPINION, HAS DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY PROBABLY UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

It is impossible to determine from the Petition and Brief what question of "general law" it claims was decided by the Court "in conflict with the weight of authority".

If it be contended that the decision of the Circuit Court of Appeals that property, which was within the putative boundaries of a town incorporated in good faith, is subject to the taxing power of the Town authorities which may be exercised for the purpose of providing for the debt service contracted for by said town during the time when the validity of the action of the town including such territory had not been questioned and during which time the town had exercised in good faith its municipal powers over such area, neither Petition nor Brief cites a decision of any Court which has held to the contrary.

On the other hand, there are at least two decisions of the Federal Courts which directly support the decision of the Court of Appeals—*Speer* v. *Board of County Commissioners*, 88 Fed. 749, and *Clapp* v. *Otoe County*, 104 Fed. 473, where certion was denied by this court. We quote the following from the latter decision:

> "When these bonds were issued and sold, every citizen of the territory comprised within the order of October 4, 1886, and called 'Nebraska City Precinct' and every piece of property therein, was represented by the Board of County Commissioners of Otoe County, in all the proceedings which culminated in the issue of these bonds. That board was the agent of these citizens and this property, under the statutes, to borrow the money which they voted to obtain upon the bonds. Under the color of law, it constituted the precinct, called the election, issued the bonds, and no man objected. Under these circumstances, Nebraska City precinct was a precinct de facto, and the board of county commissioners were its governing officers de facto, and the silence and general acquiescence of the private citizens within it and the officers of the state and county, until after the rights of the bondholders had vested, estop them from questioning the existence of the precinct, or the validity of the acts of these officers, as against the purchasers of the bonds. The acts of these officers have all the force of the acts of officers de jure for a precinct legally constituted, and the owners of the property within the boundaries of the order of the board of county commissioners of October 4, 1886, are estopped, by their silence and acquiescence, from denying that the property within those limits is liable to taxation to raise the necessary amount to pay these bonds."

There are no Federal decisions to the contrary.

If complaint is made against the holding of the Court of Appeals that:

> "We think it plain that, under the facts as they appear in the record, of a good faith attempt at incorporation, of

> user of, and acquiescence in the exercise of corporate power, a defacto corporation was created as to the territory East of the Bay, and that it is bound for the payment of the bonds in question."

we submit that this holding is supported by the decisions of the Supreme Court of Florida in *West* v. *Town of Lake Placid*, 97 Fla. 127, 120 So. 361; *State ex rel Landis et al.* v. *City of Coral Gables*, 120 Fla. 492, 163 So. 308, and also by the numerous cases cited by the Circuit Court of Appeals.

Whether a corporation exists de facto is a question of fact, assuming that there was a valid act authorizing the incorporation. The validity of the statute under which the Town of Miami Shores was organized is not questioned by Petitioner.

The Petition and Brief contend that the decision of the Circuit Court of Appeals is based on acquiescence or estoppel. This is a misconstruction of the opinion and overlooks the fact that acquiescence is material in this case only as an *element of proof that the de facto corporation* did include lands east of the Bay. The doctrine of de facto corporations is entirely separate from, and in no way connected with, estoppel to deny corporation existence. The question of whether a de facto corporation exists involves three essentials:

1. The existence of a law under which a corporation is possible.

2. An effort in good faith to incorporate.

3. A user of corporate powers.

See Fletcher Cyclopedia Corporation, Vol. 8 (Per. Ed.), page 71.

1. The Supreme Court of Florida held that the statute authorizing incorporation was Constitutional. See quotations in the opinion of the Circuit Court of Appeals.

2. It is admitted by the Petitioners that the effort to incorporate was in good faith and in accord with the provisions of the statute.

3. Both the District Judge and the Circuit Court of Appeals have held, as a matter of fact, that the undisputed evidence shows that from the time of its formation until the ouster proceeding, the town exerted jurisdiction over the whole territory, including the area east of the Bay.

Fletcher Cyclopedia Corporations, Vol. 8 (Per. Ed.), page 65, says:

> "So long as it exists, a de facto corporation is a reality and has a substantial, legal existence, and an independent status, recognized by the law. * * * It is * * * a corporation and enjoys, at least for most purposes, the status of a corporation de jure until the state questions its existence."

and on p. 179-80:

> "Ordinarily a de facto corporation, in its relation with all persons except the state, has the same powers, and is subject to the same liabilities, duties and responsibilities, as a corporation de jure" * * * and may "legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, its acts are to be treated as efficacious."

> "The doctrine of de facto corporations applies to municipal corporations."

> Fletcher Cyclopedia Corporations, Vol. 8, (Per. Ed.) page 68.

Under the admitted facts and this undisputed principle of law, rights could and did accrue against the de facto corporation by reason of the contracts executed by it. Acquiescence of the property owners, not alone, but with other proven facts of the exercise of corporate jurisdiction over the entire territory, established the existence of a de facto corporation and its legal liability under its contracts necessarily follows.

See discussion of this in Clapp v. Otoe County, supra.

While not necessary here, we call attention to an erroneous statement of Judge Sibley. In his dissenting opinion he says that "one large landowner, a defendant, resisted always and by litigation". The defendant refered to is the Petitioner here. Yet, according to the testimony of its own counsel (p. 140 Tr.), Petitioner did not purchase its property in the Town *until June, 1929;* more than a year after the bonds of the Town had been issued and more than three years after the Town had been incorporated. It purchased with full knowledge that its lands were within the boundaries of the Town. Plaintiff's Exhibit No. 5 (pp. 237-242 Tr.) shows that Mr. Sutherland, who is counsel here for Petitioner, appeared before the Town Council and requested the passage of Resolution No. 391, authorizing a change in location of Collins Avenue. In fact, Resolution No. 393, passed May 13, 1929 (pp. 240-242 Tr.) expressly recites that the purchase of lands by the Petitioner was *contingent upon the consent of the Town Council* and of the County Commissioners to the re-location of Collins Avenue and that such re-location would result in "improvements being erected thereon to the value of five to ten million dollars". (p. 241 Tr.)

Moreover, Plaintiff's Exhibit No. 2 (pp. 211-223 Tr.) specifically alleges that the lands described therein, including

Government Lots 1, 2, and 3 of Section 26, Township 52 South, Range 42 East, which includes the property of Petitioners, were "situate in the Town of Miami Shores".

CONCLUSION

We submit that the decision of the Circuit Court of Appeals follows decisions of the Supreme Court of Florida relating to the rights of holders of bonds which were issued by a municipal corporation before action was taken by the State of Florida to question the validity of the organization of the Town. The Supreme Court of Florida, having held that lands within the orbit of a de facto Town's exercise of corporate jurisdiction as a functioning municipality prior to the judgment of ouster, remain subject to the levy of taxes for the payment of debts incurred by the municipality prior to the judgment of ouster, it was the duty of the Federal Court to hold the same. The Court of Appeals' opinion and decision are in accord with Federal and other Court decisions. The rule invoked by Petitioner does not require Federal Courts to follow a decision of a State Court made in a suit to which this Respondent was not a party and where the facts were different.

The rights of Respondent arise out of the fact that the de facto municipal corporation of Miami Shores in good faith incurred obligations which were validated by the Circuit Court before any proceeding of ouster was filed and that under those circumstances lands which were within the orbit of the jurisdiction of the de facto corporation remain subject to the levy of taxes for the payment of such debts to the same extent as if they had been de jure a part of the Town. Such is the established law of the State of Florida and of Courts of

other States without exception. Petitioner has not, in either Petition or Brief, cited a single case holding to the contrary.

The nature of the proceeding and the form of the decree in this case are drawn in conformity with those affirmed by the Eighth Circuit Court of Appeals in *Fetzer v. Johnson*, 15 Fed. (2d) 145, where this Court denied a writ of certiorari.

Respectfuly submitted,

GILES J. PATTERSON,

Solicitor for Respondent,
Brown Crummer Investment Company.